

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Cable Horizontal)	
and Vertical Ownership Limits)	MM Docket No. 92-264
)	
Second Further Notice of)	
Proposed Rulemaking)	



COMMENTS

I. Introduction

The *Second Further NPRM*¹ raises issues related to media consolidation that impact ACA's members and their subscribers, and the impact is decidedly negative. Consolidation in the programming sector is quickly eroding a principal goal of the 1992 Cable Act – robust competition in the acquisition and delivery of multichannel video programming.² ACA's pending Petition for Rulemaking³ details the profoundly harmful

¹ *In the Matter of the Commission's Cable Horizontal and Vertical Ownership Limits, Second Further Notice of Proposed Rulemaking*, MM Docket No. 92-264, 2005 WL 1160211 (rel. May 17, 2005).

² *Id.* at ¶ 1.

³ American Cable Association Petition for Rulemaking, *In the Matter of Petition for Rulemaking to Amend 47 CFR 76.64, 76.93 and 76.103 Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity*, MB Docket No. RM-11203 (filed Mar. 2, 2005) ("ACA

impact of media consolidation on consumers and small and medium-sized cable systems.

In these Comments, ACA addresses several issues raised by the Commission in the *Second Further NPRM* that are related to media consolidation or impact smaller markets.

- What is the impact of digital tiers on carriage of independent networks?
- Is there excess channel capacity?
- Is DBS a substitute for cable?

As ACA explains below, media consolidation and regulatory imbalances – not cable ownership – are endangering MVPD competition in smaller markets.

About the American Cable Association. ACA represents nearly 1,100 small and medium-sized cable companies that serve more than 8 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district. The companies range from family-

Petition”) and Reply Comments of the American Cable Association (filed May 3, 2005). ACA has also filed comments in a number of dockets demonstrating how the retransmission consent practices of networks and affiliate groups harm ACA members. See, e.g., *In the Matter of Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, Comments of SCBA (filed October 13, 1998), and Comments of the American Cable Association (filed June 8, 2001) (“ACA Digital Must Carry Comments”); *Inquiry Concerning A La Carte, Themed Tier Programming and Pricing, Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, MB Docket No. 04-207, Comments of the American Cable Association (filed July 12, 2004) (“ACA A La Carte Comments”); *In re Consolidated Application of General Motors Corporation, Hughes Electronic Corporation, and The News Corporation for Consent to Transfer Control*, MB Docket No. 03-124, Comments of the American Cable Association (filed June 16, 2003) (“ACA News. Corp Comments”) and Reply Comments of the American Cable Association (filed July 1, 2003) (“ACA News. Corp. Reply Comments”); *Petition for Inquiry into Retransmission Consent Practices*, American Cable Association, Proceeding PRM02MB (filed October 1, 2002) (“ACA Petition for Inquiry”) and *Petition for Inquiry into Retransmission Consent Practices First Supplement* (filed December 9, 2002) (“ACA Petition for

run cable businesses serving a single town to multiple system operators that focus on serving smaller markets. More than half of ACA's members serve fewer than 1,000 subscribers. All ACA members face the challenges of upgrading and operating broadband networks in lower-density markets. All ACA members and their customers face higher costs for basic cable service because of the retransmission consent practices of network owners and affiliate groups.

II. The negative effect of retransmission consent tying on carriage of independent channels on digital tiers

In the *Second Further NPRM*, the Commission notes that there has been a rise in the number of cable networks seeking to be positioned on cable operators' digital tiers. Accordingly, the Commission seeks comment on the impact of digital tiers on carriage for independent networks.⁴ The impact has been less than expected.

Many of ACA's members are unable to provide independent networks with carriage on their digital tiers. The reason? Retransmission consent tying by programming conglomerates is filling up channel capacity on digital tiers and draining financial resources that could be used for carriage of independent programming.

Disney, Fox, Hearst-Argyle and others force carriage of affiliated satellite programming on small and medium-sized cable operators as a condition for granting retransmission consent for their local broadcast affiliates. More often than not, these conglomerates also force cable operators to pay per-subscriber fees for the affiliated

Inquiry Supplement”). ACA incorporates those filings by reference in these comments.

⁴ *Second Further NPRM* at ¶ 54.

programming. ACA has documented these abuses in a number of filings with the Commission.⁵

The crisis continues. One early example from the upcoming retransmission consent round: Hearst-Argyle is requiring that small and medium-sized cable operators pay for and place three Lifetime channels on their systems to get access to the local Hearst-Argyle affiliate. The only alternative offered by Hearst-Argyle? A \$0.50 - \$0.60 per-subscriber monthly fee for their free over-the-air broadcast network signal. The “price” set by Hearst-Argyle has no relation to any measure of value of the signal. Regardless of the market, regardless of the network affiliate, regardless of the station’s ratings, when Hearst-Argyle deals with a small or medium-sized cable company, the price is the same. This conduct has everything to do with Hearst-Argyle’s market power, as it has amassed control over 31 commercial broadcast stations, multiple satellite channels, and other media assets.

Hearst-Argyle’s treatment of small and medium-sized cable companies fulfills the Commission’s prediction about how broadcasters could use retransmission consent to extract supracompetitive prices, especially when dealing with small and medium-sized cable companies.⁶

⁵ See, e.g. *ACA Petition for Inquiry* at pp. 3-4; *ACA Petition for Inquiry Supplement* at pp. 1-3, 6-18, 19; *ACA Petition* at pp. 24-25; *In the Matter of 2002 Biennial Regulatory Review, Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket 02-277, *Reply Comments of the American Cable Association* (filed February 3, 2003) at pp. 1-5, 8-9.

⁶ *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, *Memorandum Opinion and Order*, 19 FCC Rcd. 473 (2004) (“News

For some small and medium-sized cable operators, many of which serve lower-income rural areas with lower capacity cable systems, this means that they cannot carry or pay for independent programming. Accordingly, retransmission consent abuses directly affect smaller market consumers' programming diversity.

III. Many smaller cable systems have no excess capacity

In the *Second Further NPRM*, the Commission asks whether cable systems have excess capacity.⁷ For small and medium-sized cable companies, the answer is often “no.” Hobbled by rising programming and operational costs,⁸ a significant subset of ACA's members have been unable to upgrade their smaller systems to digital. These

Corp. Order”), ¶ 202 (“[W]e agree with commenters who contend that carriage of local television broadcast station signals is critical to MVPD offerings.”) and ¶ 176 (“[W]e agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for ‘must have’ programming. . .”).

⁷ *Second Further NPRM* at ¶ 58.

⁸ ACA has documented for the Commission the rapidly escalating costs of must-have programming like ESPN. See, e.g., *ACA News Corp. Reply Comments* at pp. 4, 6-7; *ACA A La Carte Comments* at pp. 38-39. EAS equipment and installation is another expense adversely affecting ACA members' ability to upgrade their systems. The Commission has recognized this financial hardship in scores of orders temporarily waiving EAS requirements on financial hardship grounds. See, e.g., *Bayou Cable, Inc.; Request for Waiver of Section 11.11(a) of the Commission's Rules*, 17 FCC Rcd. 11,835 (2002); *Big Sandy Telecom, Inc.; Request for Waiver of Section 11.11(a) of the Commission's Rules*, 17 FCC Rcd. 11,795 (2002); *Carson Communications, L.L.C.; Request for Waiver of Section 11.11(a) of the Commission's Rules*, 17 FCC Rcd. 10,431 (2002); *Centre TV, Inc.; Request for Waiver of Section 11.11(a) of the Commission's Rules*, 17 FCC Rcd. 11,844 (2002); *Diode Cable Company; Request for Waiver of Section 11.11(a) of the Commission's Rules*, 17 FCC Rcd. 11,814 (2002); *KRM Cablevision, Inc.; Request for Waiver of Section 11.11(a) of the Commission's Rules*, 17 FCC Rcd. 11,847 (2002); *Milestone Communications, L.P.; Request for Waiver of Section 11.11(a) of the Commission's Rules*, 17 FCC Rcd. 11,838 (2002); *Panora Cooperative Cable Association; Request for Waiver of Section 11.11(a) of the Commission's Rules*, 17 FCC Rcd. 11,817 (2002); *Project Services, Inc.; Request for Waiver of Section 11.11(a) of the Commission's Rules*, 17 FCC Rcd. 10,441 (2002); *Souris River Television, Inc.; Request for Waiver of Section 11.11(a) of the Commission's Rules*, 17 FCC Rcd. 10,438 (2002); *WMW Cable Television Co.; Request*

systems are channel locked. Retransmission consent tying abuses only exacerbate the problem.⁹

For ACA members with digital systems, the situation is not much better.¹⁰ As described in the section above, retransmission consent tying fills their digital tiers. This round, members are also dealing with broadcaster's inflexible demands that they carry multicast programming as a condition of retransmission consent for the HD feed of local affiliates. Coupled with retransmission consent tying, these demands will overload many digital systems' available capacity. ACA has documented this problem in numerous comments filed with the Commission.¹¹

IV. DBS' unwarranted competitive advantage

In the *Second Further NPRM*, the Commission asks whether DBS is a substitute for vertically-integrated cable systems.¹² ACA cannot speak for the higher-density areas served by vertically-integrated cable systems, but in rural areas, DBS is not only a substitute for small and medium-sized systems, it is putting the competition out of business.

The GAO reports that between 2001 and 2004, DBS penetration grew 15% in rural

for Waiver of Section 11.11(a) of the Commission's Rules, 17 FCC Rcd. 10,444 (2002).

⁹ See, e.g., *ACA Petition for Inquiry* at pp. ii-iii, 1-5, 10-11, 19; *ACA Digital Must Carry Comments* at pp. 4-16.

¹⁰ See, e.g., *ACA Petition for Inquiry Supplement* at pp. 7-8, 12-13.

¹¹ See, e.g., *ACA A La Carte Comments* at pp. 37-38; *ACA Digital Must Carry Comments* at pp. 4-16.

¹² *Second Further NPRM* at ¶ 28.

areas to 29% of rural households.¹³ One reason for this astounding growth? DBS enjoys favored regulatory treatment that gives it a great advantage in the rural marketplace. ACA's members, half of which serve fewer than 1,000 subscribers, are behind a regulatory eight ball when trying to compete with the 21.3 million-subscriber DBS duopoly:

Regulatory Burdens on Cable vs. DBS

CABLE	DBS
<ul style="list-style-type: none"> • Must-Carry • Retransmission Consent • EAS • Tier Buy-Through • Franchise Fees • Local Taxes • Signal Leakage/CLI • Rate Regulation • Mandatory Broadcast Basic • Customer Service Obligations • Public Interest Obligations • Service Notice Provisions • Closed Captioning • Billing Requirements • Pole Attachment Fees • Public File Requirements 	<ul style="list-style-type: none"> Must-Carry Retransmission Consent Limited Public Interest Obligations

Horizontal and vertical ownership limits are important issues for the Commission, but in smaller markets and rural areas, the regulatory disparity between independent cable and DBS must be addressed if Congress and the Commission want to facilitate competition in the delivery of multi-channel video programming.

¹³ *Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies across Different Types of Markets, Report to the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, U.S. Senate, GAO-05-257 (April 2005) at p. 7.*

V. Conclusion

As the *Second Further NPRM* notes, a principal goal of the Cable Act is to foster a diverse, robust, and competitive market in the acquisition and delivery of multichannel video programming.¹⁴ Cable ownership limits may be a step toward achieving this goal in high-density markets. In the smaller markets served by ACA's members, however, retransmission consent abuses and regulatory imbalances are the critical issues that the Commission must remedy if smaller market consumers are to enjoy competition in the MVPD marketplace.

Respectfully submitted,

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¹⁴ *Second Further NPRM* at ¶ 1.